87-1779

Supreme Court, U.S.
FILED
APR 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1988

DUANE WENDALL LARSON, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PETITIONER'S APPENDIX

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 87-5130

Duane Wendall Larson,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
v.	*	District Court
	*	for the Dist-
United States of America,	*	rict of Minn-
	*	esota
Appellee.	*	

Submitted: August 20, 1987

Filed: December 4, 1987

Before McMILLAN, FAGG, and BOWMAN, Circuit Judges

PER CURIAM.

Duane Wendall Larson filed four motions seeking post conviction relief. He now appeals pro se from the district court's order denying his section 2255 and recusal motions and awarding only partial relief on his resentencing and expungment motions. We affirm.

In 1984, Larson received a ten-year prison sentence for possession of cocaine with intent to distribute. The following year, the government filed an indictment charging Larson with three counts of income tax evasion and two counts of making false statements relating to currency transactions. Acting on its own motion and over Larson's objection, the district court severed the currency transaction counts and scheduled them for trial. Following a bench trial, the district court found Larson guilty of both currency transaction charges and sentenced him to consecutive five-year prison terms to be served after he completed his cocaine related sentence. Larson then entered a plea to one of the three tax evasion counts and received a $10,000 fine and a five-year prison term to be served concurrently with his currency transaction sentences. The government dismissed the remaining tax evasion counts.

In 1986, this court reversed Larson's currency transaction convictions on constitutional grounds. See United States v. Larson, 796 F. 2d 244, 247 (8th Cir. 1986). Larson then filed these postconviction motions all of which relate to the sentence he received for tax evasion.

28 U.S.C. §2255 MOTION

Larson's section 2255 habeas motion contains a number of constitutional challenges. The first claim is that the severance of the two currency transaction charges from the tax evasion counts violates the double jeopardy clause. The double jeopardy clause, however, only applies when the offenses charged are the same in law or in fact. See United States v. Green, 600 F. 2d 154, 159 (8th Cir. 1979). The tax evasion counts against Larson were for the tax years 1978, 1979, and 1980, while his currency transaction offenses occurred in 1982. Thus, Larson's double jeopardy claim is without merit.

A second claim in Larson's section 2255 motion is that the court's severance violates a due process right to have a single trial on all five charges. Larson cites no authority in support of this claim and we conclude it is also without merit. Absent clear prejudice and abuse of discretion, this court will rarely disturb the district court's decision on whether severance is appropriate. See United States v. Ferguson, 776 F. 2d 217, 224 (8th Cir. 1985), cert denied, 475 U. S. 1020 (1986); United States v. King, 567 F. 2d 785, 788 (8th Cir. 1977), cert. denied, 435 U.S. 945 (1978); Fed. R. Crim. P. 14. Larson claims no prejudice other than the denial of a right to a single trial on all five counts. We note the district court stated it severed the charges against Larson to prevent the "[p]otential prejudice that arises in a case involving complex and confusing issues, such as the instant case." In these circumstances we

find the district court did not abuse its discretion in severing the currency transaction charges from the other counts.

Finally, Larson's section 2255 motion claims the court's severance of the currency transaction counts violated his due process rights because by doing so the court (1) punished him for his original refusal to plead guilty; and (2) became improperly involved in Larson's plea negotiations with the government. The record, however, contains no support for either of these claims and we reject them. We have reviewed all of the other claims in Larson's section 2255 motion and find them to be without merit. Thus, the district court correctly denied Larson's section 2255 motion in its entirety.

MOTION FOR RESENTENCING

Larson seeks resentencing for his tax evasion conviction primarily on two grounds: (1) the court violated rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure in

the sentencing hearing; and (2) the presentence investigation report (PSI) contained references to the two currency transaction convictions overturned on appeal.

There is merit to the first of Larson's claims to the extent the sentencing court failed to create a proper record regarding objections Larson and his attorney made to portions of Larson's PSI. See Fed. R. Crim. P. 32(c)(3)(D). A defendant, however, has no right to be resentenced when the district court expressly states it did not rely on the challenged information in sentencing. United States v. Fahnbulleh, 796 F. 2d 239, 240 (8th Cir. 1986) (per curiam). In reviewing Larson's present motion, the sentencing court stated: "The controverted matters were not considered in sentencing, and a written record of that determination shall be attached to the PSI as required by Rule 32(c)(3)(D)." Once the court's direction is carried out and the written record becomes

part of Larson's PSI--including those copies maintained by the Bureau of Prisons or the United States Parole Commission--rule 32 is satisfied. See Poor Thunder v. United States, 810 F. 2d 817, 826 (8th Cir. 1987). Larson is entitled to no additional relief in this regard.

This same PSI contains references to Larson's currency transaction convictions later reversed by this court. Larson's claim that our reversal now entitles him to resentencing, however, is without merit. District courts have broad discretion in the information they consider at sentencing hearings, and courts of appeal are generally without authority to review sentences falling within statutory maximums. United States v. Wright, 799 F. 2d 423, 426 (8th Cir. 1986). Sentences based on material misinformation or erroneous assumptions violate due process. Id. Larson, however, does not show the district court relied on the curr-

ency transaction convictions in sentencing him. The district court stated it considered "the aggravating circumstances of [Larson's] cocaine record" to determine his sentence. For these reasons we do not find the district court abused its discretion in imposing the maximum sentence for tax evasion on Larson. The district court properly dismissed all the remaining claims contained in Larson's motion for resentencing.

MOTION TO EXPUNGE

Larson contends all references to the reversed currency transaction convictions should now be expunged from any records that will be used in the future to determine his eligibility for parole. The district court did not order expungment but did direct the government to attach a notation to Larson's PSI that the currency transaction convictions were reversed. We agree with the district court that once this is done Larson cannot show he is prejudiced or will

be harmed by the presence of the currency transaction convictions in his records. The Parole Commission excludes any convictions reversed on constitutional grounds when it computes a prisoner's salient factor score. 29 C.F.R. §2.20 (1986). Accordingly, we find the district court has awarded Larson all of the relief to which he is entitled.

MOTION TO RECUSE

The recusal motion Larson filed under 28 U.S.C. §§ 144 and 455 claims the district court showed pervasive personal bias and prejudice toward him during the currency transaction proceedings. Decisions on recusal or disqualification motions are committed to the district court's sound discretion. Gilbert v. City of Little Rock, 722 F. 2d 1390, 1399 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984). After reviewing the record, we conclude the district court did not abuse its discretion in denying Larson's motion.

CONCLUSION

In summary, we affirm the district court's denial of Larson's section 2255 and recusal motions as well as its granting of partial relief on his resentencing and expungment motions. We also affirm the court's orders directing the PSI prepared for Larson's tax evasion conviction to be amended to reflect: (1) the sentencing court did not rely on the portions to which Larson and his attorney objected; and (2) the currency transaction convictions referred to in the PSI were reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[TO BE PUBLISHED]

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5130-MN

Duane Wendall Larson,	*	Appeal from the
	*	United States
Appellant,	*	District Court
	*	for the District
vs.	*	of Minnesota
	*	
United States of America,	*	
	*	
Appellee.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

January 29, 1988

Order entered at the direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals,
Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-5130MN

Duane Wendall Larson,	*	
Appellant,	*	Appeal from the United States District Court for the District of Minnesota
vs.	*	
United States of America,	*	
Appellee.	*	

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties without oral argument.

After consideration it is ordered and adjudged that the judgment of the district court be affirmed in accordance with the opinion of this Court.

December 4, 1987.

A true copy:

ATTEST: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS, 8TH CIRCUIT
MANDATE ISSUED: FEBRUARY 9, 1988

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Cr. 3-85-43

DUANE WENDALL LARSON, ORDER

Defendant

Defendant has moved for recusal, for vacation of his sentence, for resentencing, for expungment of his reversed conviction, for production of transcripts, and for a stay. The court has received all of the briefs from the government and defendant, defendant's final brief having been filed January 26, 1987. The court has considered the motions without oral argument and has found them to be without merit.

Defendant had been convicted in 1984 for possession of cocaine with intent to distribute, and was sentenced by Judge Murphy to ten years. In 1985, defendant was indicted

for three counts of tax evasion and two counts of failure to report currency transactions (CTR). A status conference was held on May 31, 1985, during which the court suggested the parties discuss settlement. After the parties returned without reaching settlement, the court reviewed the charges and maximum punishments, indicated that ten years could be

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imposed for a conviction on the two CTR counts, and stated that severing the CTR counts and trying them first would take only a day or two and might make the remaining counts for tax evasion superfluous. After considering the parties' briefs regarding its authority to sever the CTR counts for trial sua sponte, the court order [sic] that the CTR counts be severed and set the CTR counts on the trial calendar.

Defendant waived the jury for the CTR trial and was convicted on both counts foll-

owing a one and one-half day court trial. After reviewing the PSI, the court sentenced defendant to ten years consecutive to his ten years for cocaine possession. Two and one-half weeks later, defendant pled guilty to the second count for tax evasion pursuant to an agreement that the remaining counts would be dismissed and that any sentence would be consecutive to the cocaine possession term and concurrent with the CTR term. While both defendant and his attorney noted two objections to the PSI on forms acknowledging they had read the PSI, neither of them mentioned those objections at the sentencing hearing. The court sentenced defendant to five years on Count II for tax evasion, consecutive to his ten-year cocaine term and concurrent with his ten year term.

Defendant successfully appealed his CTR conviction to the eighth circuit which reversed the conviction as unconstitutional on the ground that the CTR statute had not

given defendant a fair warning that his actions were illegal.

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Many of defendant's current motions are primarily based upon his dissatisfaction with the manner in which the status conference was conducted, particularly the court's suggestion that the parties discuss settlement and the subsequent sua sponte severance of the CTR and tax evasion counts. Two motions are further based on his dissatisfaction with the manner in which the sentencing hearing for count II was conducted and the fact that his CTR conviction was reversed.

Defendant's motion for a stay pending the outcome of his writ of mandamus is moot because the eighth circuit denied the writ on January 8, 1987.

Defendant's motion for recusal pursuant to 28 U.S.C. §144 must be denied. Defendant's affidavit, filed well after he discovered the alleged grounds for recusal, was untimely.

Davis v. Cities Service Oil Co., 420 F. 2d 1278 (10th Cir. 1970); Taylor v. United States, 172 F. 2d 640 (9th Cir. 1950), cert. denied, 339 U.S. 988. Furthermore, the affidavit is insufficient because it does not claim that the alleged bias stems from an extrajudicial source and caused the court to base its sentencing decision on the merits of something not learned through the court's participation in the case. United States v. Faul, 748 F. 2d 1204, 1211 (8th Cir. 1984), quoting United States v. Grinnel Corp., 384 U.S. 563, 583 (1966). Having shown no additional reasons supporting recusal under 28 U.S.C. §455, the court declines to recuse itself under that section. Gilbert v. City of Little Rock, 722 F. 2d 1390, 1399 (8th Cir. 1983), cert. denied, ___ U.S. ___, 104 S. Ct. 2347 (1984); Davis v. Board of School Comm'rs, 517 F. 2d 1044, 1051-52 (5th Cir. 1975).

Defendant's motion for vacation of sent-

ence pursuant to 28 U.S.C. §2255 must be denied. His guilty plea waived his speedy trial and ineffective assistance of counsel defenses. United States v Lee, 500 F. 2d 586 (8th Cir. 1974) (speedy trial defense waived); cf. Rice v. United States, 420 F. 2d 863 (5th Cir. 1969), cert. denied 398 U.S. 910 (197) (assistance of counsel waived). Assuming, arguendo, that his double jeopardy defense was not waived, Haring v. Prosise, 462 U.S. 306 (1983), defendant has not made a plausible argument that the double jeopardy clause was violated by the severance, by the court's suggestion that the parties discuss settlement, by the introduction of certain evidence into the CTR trial that was also allegedly relevant to the tax evasion charges, or by any other means. Finally, to the extent that defendant appears to argue that the court relied upon improper factors in sentencing him, he has failed to meet his burden of showing facts in the record

demonstrating that the court relied upon any alleged improper facts. United States v. Moore, 656 F. 2d 378 (8th Cir. 1981). Imposition of the maximum sentence is supported by the aggravating circumstance of defendant's cocaine record.

Defendant's motion for resentencing due to an alleged violation of Federal Rules of Criminal Procedure, Rule 32

(C)(3)(D) must be denied. The court reviewed the PSI and all attached documents prior to sentencing defendant, including the two objections made by defendant and his attorney. Since neither defendant nor his counsel raised the objections at the hearing, the court did not verbalize its determination that a finding as to the accuracy of the challenged portions of the PSI was unnecessary because the controverted portions would not be taken into account in sentencing. The controverted matters were not considered

in sentencing, and a written record of that determination shall be attached to the PSI as required by Rule 32(C)(3)(D). Resentencing is not justified, however. Poor Thunder v. United States, No. 85-5362, slip op. at 16 (8th Cir. Feb. 6, 1987).

Defendant's motion for expungment and for an order restraining government personnel from disclosing the reversed CTR conviction must be denied. Defendant fails to demonstrate how the record of his reversed CTR conviction will harm him. On the contrary, defendant argues that the Parole Commission is not permitted to rely upon a conviction reversed on constitutional grounds when computing the salient factor score, citing 28 C.F.R. §2.20, Chapter 13, Item A.7. Defendant's argument that expungment is necessary to protect his right to privacy is unconvincing and unsupported. Absent a showing of injury caused by the existance of the CTR conviction information in these various

records, the court will not monitor the wisdom and soundness of various executive departments maintaining such

information in their records. Laird v. Tatum, 408 U.S. 1, 15 (1972).

Defendant's motion for production of transcripts must be denied because defendant has not shown why he is entitled to transcripts nor why the transcripts already prepared and made part of the clerk of court's file are not sufficient.

Based upon the foregoing, upon submitted memoranda, and upon all files, records and proceedings herein,

IT IS ORDERED that:

1.) Defendant's motion for a stay is denied.

2. Defendant's motion for recusal is denied.

3.) Defendant's motion for vacation of sentence is denied.

4.) Defendant's motion for resentencing is denied.

5.) Defendant's motion for expungment and injunction is denied.

6.) Defendant's motion for production of transcripts is denied.

7.) A written record of the court's determination as to the controverted portions of the PSI shall be appended to the PSI.

8.) The government shall be directed to append to the PSI a notation that the CTR convictions were reversed on constitutional grounds.

Dated: February 26, 1987

EDWARD J. DEVITT
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	INDICTMENT
	)	
v.	)	(26 U.S.C. §7201)
	)	(18 U.S.C. §1001)
DUANE WENDALL LARSON,	)	(18 U.S.C. §2)
	)	
Defendant.	)	

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT I

On or about April 16, 1979, in the District of Minnesota, the defendant

DUANE WENDALL LARSON,

a resident of Mankato, Minnesota, who during the calendar year 1978 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1978, by preparing and causing to be signed and by mailing and causing to be mailed, in the District of Minnesota, a false and fraudulent income tax return on behalf of himself and

his wife, which was filed with the Internal Revenue Service, wherein it was stated that their adjusted gross income was minus $3,020, resulting in a Tax Table income for said calendar year of minus $3,661.00 and that the amount of income tax due and owing thereon was $0.00 (zero), whereas, as he then and there well knew, their joint taxable income for said calendar year was substantially greater than that reported, and that upon the omitted taxable income there was due and owing to the United States of America substantial additional tax; in violation of Title 26 United States Code, Section 7201.

COUNT II

On or about April 15, 1980, in the District of Minnesota, the defendant,

DUANE WENDALL LARSON,

a resident of Mankato, Minnesota, who during the calendar year 1979 was married, did wilfully and knowingly attempt to evand and

defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1979, by preparing and causing to be prepared, by signing and causing to be signed and by mailing and causing to be mailed, in the District of Minnesota, a false and fraudulent income tax return on behalf of himself and his wife which was filed with the Internal Revenue Service, wherein it was stated that their Tax Table income for said calendar year was minus $80,286.00 and that the amount of income tax due and owing thereon was none (zero), whereas as he then and there well knew, their joint taxable income for said calendar year was substantially greater than that reported, and that upon the omitted taxable income there was due and owing to the United States of America substantial additional tax; in violation of Title 26 United States Code, Section 7201.

COUNT III

On or about April 15, 1981, in the District of Minnesota, the defendant,

DUANE WENDALL LARSON,

a resident of Mankato, Minnesota, who during the calendar year 1980 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1980, by preparing and causing to be prepared, by signing and causing to be signed and by mailing and causing to be mailed, in the District of Minnesota, a false and fraudulent income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service, wherein it was stated that their Tax Table income for said calendar year was none (zero), whereas, as he then and there well knew, their joint taxable income for said calendar year was substantially greater than that reported, and that upon the

omitted taxable income there was due and owing to the United States of America substantial additional tax; in violation of Title 26 United States Code, Section 7201.

COUNT IV

On or about September 17, 1982, in the District of Minnesota, the defendant,

DUANE WENDALL LARSON,

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in a matter within the jurisdiction of the United States Treasury Department, did wilfully and knowingly conceal and cause to be concealed, and cover up and cause to be covered up, by a trick, scheme and device, a material fact, namely the multiple purchase of bank money orders and cashier's checks in an amount in excess of $10,000.00 in a single day; specifically, ten bank money orders and cashier's checks at National City Bank, Minneaopolis, Minnesota, and F & M Marquette National Bank, Minneapolis, Minnesota, totalling $44,500; in violation of Title 18

United States Code, Sections 1001 and 2.

COUNT V

On or about November 30, 1982, in the District of Minnesota, the defendant,

DUANE WENDALL LARSON,

in a matter within the jurisdiction of the United States Treasury Department, did willfully and knowingly conceal and cause to be concealed, and cover up and cause to be covered up, by a trick, scheme and device, a material fact, namely the multiple purchase of bank money orders and cashier's checks in an amount in excess of $10,000.00 in a single day; specifically, twelve bank money orders and cashier's checks at Western State Bank, St. Paul, Minnesota, National City Bank, Minneapolis, Minnesota, and F & M Marquette National Bank, Minneapolis, Minnesota, totalling $53,300; in violation of Title 18 United States Code, Sections 1001 and 2.

A TRUE BILL

UNITED STATES ATTORNEY FOREPERSON

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

United States of America, Plaintiff, v. Duane Wendall Larson, Defendant.	Cr. 3-85-43

The above entitled matter came on for hearing before the Honorable Edward J. Devitt, Senior Judge of the above named Court, on Friday, May 31, 1985, at St. Paul, Minnesota, commencing at 9:13 a.m.

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Friday Morning,
May 31, 1985,
9:13 a.m.

THE COURT: Larson, Duane Larson.

MR. VOSEPKA: Richard Vosepka on behalf of the government, Your Honor.

MR. SMITH: Ray Smith on behalf of the defendant, who is present in Court, Your Honor.

THE COURT: And you're aided by competent counsel --

MR. SMITH: Mr. Kelly.

THE COURT: Mr. Kelly?

MR. SMITH: Yes, I am, Your Honor.

THE COURT: Okay. Well, how are we getting along?

MR. VOSEPKA: Well, Your Honor, we have gone through discovery with Mr. Smith.

I believe it was two Fridays ago or the Friday before this?

MR. SMITH: It was.

MR. VOSEPKA: And had some discussions, both regarding stipulations, and discovery and plea. We had further discussion --well, we had discussions prior to that, and we had further discussion, Mr. Smith and myself, on Thursday of this week. At the present time, it appears that

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we are likely to got to trial, and it appears

that we are working together with regard to stipulations to try to ease the burden not only on the Court's time, but on both counsel's time, as far as the need to call a lot of witnesses, for instance, for authentication of documents. I have presented to Mr. Smith this morning, as well as to the Court, the government's proposed voire dire and jury instructions, numerous testimonial stipulations, and an incomplete exhibit list, an in--

THE COURT: Well, before we talk about all of that, what about settlement? Let's get to the settlement. Have you visited about that?

MR. VOSEPKA: Yes, we have, Your Honor.

THE COURT: And what happened?

MR. VOSEPKA: My judgment is both counsels have been exploring settlement reasonably and attempting to see what could be done. My view of the situation is that the defendant in this case is just not inclined

to plead. And, of course, that is his right.

MR. SMITH: Based on the settlement offer of the government, Judge, we're ready for trial.

As far as the stipulations, I'm sure we can enter--most of the case is going to be by stipulation, Judge.

THE COURT: Won't you come over to the

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microphone?

MR. SMITH: Oh, my fault, Your Honor. I see the case--unless Mr. Vosepka sees it differently, I see it as only being three or four days.

THE COURT: On, three or four. We don't have three- or four day trials here. Our longest one is two days.

MR. SMITH: Two day trials?

THE COURT: The last one was seven hours, I think.

MR. SMITH: All right, Judge.

THE COURT: You'll match that?

MR. SMITH: Right. I'll waive cross, Your Honor.

THE COURT: That's good. What's he charged with?

MR. VOSEPKA: Your Honor, he's charged with three counts of tax evasion for the years 1978, 1979, 1980.

THE COURT: Tax evasion?

MR. VOSEPKA: Tax evasion, yes, sir, under 26 U.S.C. 7201.

Then there are two counts, Counts IV and V, which relate to what we often refer to as the false-statement statute, Title 18 United States Code 1001, which, in this

case, involves the use of deceit, trickery, scheme to defraud the United States in some material matter within the jurisdiction of an agency, that being transactions in 1982, on two separate days, in which Mr. Larson

went around to various banks and engaged in currency transactions under the $10,000-reporting requirement that the financial institutions have for purposes of--

THE COURT: How many of those counts?

MR. VOSEPKA: Two, Your Honor.

Those should be simple to try. Obviously the tax charges will be the more lengthy case.

But at the same time, Mr. Smith, as he has indicated to me, thinks that, as far as the authentication of documents--

THE COURT: You'll use the microphone, too, won't you?

MR. VOSEPKA: Thank you, Your Honor.

As far as the authentication of documents, he's indicated that he feels we can accomplish most of those witnesses through stipulation, which I believe can get us down to a short case.

THE COURT: You're talking about trial, now. I'm still talking about something else.

MR. VOSEPKA: Yes, Your Honor. Well,

Your Honor, I think I have proposed a very reasonable settlement

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of this case, given the nature of this defendant's conduct over a period of years. In fact, very reasonable settlement under any circumstances.

Mr. Smith's response, to the extent he ever articulated anything--and I of course won't go into the details--was such as to indicate to me that his client was not truly interested in pleading guilty unless the government just laid down and gave the case away, which I think the taxpayers expect me not to do.

So I have seriously and considerately pursued plea negotiations. I would just as soon not try this case and save the government the time, myself the time, the trial risk which is inherent in any case, but I--

THE COURT: The Court's time?

MR. VOSEPKA: The Court's time; yes, sir. We're always considerate of that.

But I'm afraid unless Mr. Larson has a change of heart, there's nothing we're going to be able to do to accomplish that purpose.

THE COURT: Have you had an opportunity to talk about--he has no past criminal record, I suppose?

MR. SMITH: Yes. Well, I think Your Honor should know the full picture here as to what's happened.

THE COURT: Oh.

MR. SMITH: Mr. Larson, about a year ago, was

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convicted in this Court before Judge Murphy and sentenced to ten years in custody. That was on a charge of possession of cocaine. At the time of sentencing, Judge Murphy was made aware of, by Mr. Vosepka, all the charges that are presently before Your Honor,

including the credit transactions and the fact that the government claimed that he had substantial amounts of income that he did not report on his--she took that all into consideration. She came to a conclusion that the appropriate sentence under all the circumstances would be ten years. He had no prior record before that time, Your Honor. So we are now faced with that.

THE COURT: What kind of drug was it?

MR. SMITH: It was cocaine, Your Honor.

THE COURT: Direct buy, or possession or-

MR. SMITH: Possession. Of a substantial quantity, though, Your Honor, in a motel room.

And I might say, just briefly, so that Your Honor gets the whole picture, we had what we still consider to be a valid, arguable constitutional argument that the search was not properly conducted.

THE COURT: You should have appealled.

MR. SMITH: We did, Your Honor.

THE COURT: Oh. And what happened?

MR. SMITH: The Eighth Circuit disagreed with us.

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THE COURT: They affirmed?

MR. SMITH: They affirmed. We have now presented a Petition for Rehearing En Banc. That petition was filed approximately 50 days ago. We have not heard from the Eighth Circuit yet. So we're waiting for that. Now--

THE COURT: And the chances are?

MR. SMITH: Excellent, Your Honor. No- yes, I think we have an excellent argument, Your Honor. And there's no question about it.

THE COURT: Who was on the panel that decided?

MR. SMITH: Three fine Judges. Judge Heany, Judge Ross, who wrote the opinion, and Judge--I've got a blank. Judge Fagg. Yes, Your Honor.

Okay. All right. Now, there's also no question, Your Honor, that I am convinced that we should also petition--if we lose in the Eighth Circuit for a Petition for Rehearing En Banc, that we should petition to the Supreme Court of the United States.

THE COURT: And the issue would be the search?

MR. SMITH: Search. One hundred percent, the search.

THE COURT: And you say Judge Heaney was on that panel?

MR. SMITH: He was.

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A warrantless search. He asked a lot of good questions, Your Honor, but unfortunately, ruled the other way.

Now, so that's the difficult posture in here. Now--

THE COURT: That's almost a dead horse, isn't it? 'Tis a dead horse, isn't it?

MR. SMITH: No. I really don't think so, Judge.

THE COURT: Well, anyway, go ahead.

MR. SMITH: Not with the tendency of the Supreme Court, Your Honor, going towards reversals in these types of cases?

THE COURT: Oh?

MR. SMITH: And so, we are going to appeal, Judge, to the Supreme Court, petition for certiorari.

Now, that posed one of the problems of the case before Your Honor. Mr. Vosepka wanted that case in place. He realized that he could not ask us to drop an appeal, but, yet, he wanted the ten years in place. And that's his difficulty. And so--and there were other considerations brought up about Mr. Larson's family. We did not want to get into a plea agreement that involved any of that. And so, we are -- we found the so-called offer of the United States Government completely, in other words, unacceptable,

Your Honor. I mean, there's no other alternative. We do feel that there are many weaknesses in the government's case here, that we have a legitimate defense.

THE COURT: About that bank over $10,000? Weaknesses in that?

MR. SMITH: I think so, Your Honor.

Especially in the tax case, which their starting point and their proof of income to me so far, of what I've seen, is very weak. So that's the difficulty. I don't doubt Mr. Vosepka's sincereity about approaching this, but I mean--look. He was talking about a number of years in excess of the ten years already given by Judge Murphy, who considered all these matters before Your Honor. And I'd have to resign as a defense counsel to accept it, Your Honor. I really did not see--

THE COURT: Do you expect to resign?

MR. SMITH: I mean my shingle. I'd have to resign.

MR. VOSEPKA: Your Honor, if I might comment to some extent on that.

First of all, we did not in any way make any situation with regard to any family members as a part of any plea bargain or any proposal in that regard. If Mr. Smith were to say that the only hangup was the fact that we

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wanted to have our ten years in place, I'll say now that we'll let him go forward with his petition both to the Eighth Circuit and to the Supreme Court. I don't think we'd have any option in the plea bargain in any event. And our offer was--and our offer would stand as it stood on Tuesday. But I don't think that's going to accomplish anything, because I don't think Mr. Larson is willing to plead unless we had some agreement to concurrency of sentence. And we're not agreeable to limiting this Court in

that an acceptable bargain once the Court saw all the facts.

For instance, Mr. Smith mentions that it was a substantial quantity of cocaine. It was three pounds of pure cocaine that Mr. Larson was apprehended with. He was convicted of one count of possession with an intent to distribute. Judge Murphy, as Mr. Smith correctly points out, awarded him a ten-year sentence and a maximum fine of $25,000. To my knowledge, and I may be wrong on this, I think Judge Murphy has never, in her time on the bench, awarded a higher sentence to any defendant than ten years. She was aware of the facts of this case through various motions made by the defense and matters in the Presentence Report.

However, I should make this Court aware that the

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facts relating to his drug conviction are

three years removed from the closest tax year that's involved in the case that's now before the Court. So this is not truly a case that arises in a similar circumstance. The investigation of the tax case was ongoing for a long time before that incident resulted in the conviction before Judge Murphy. And it was ongoing after that time. They truly are separate cases. The only way in which you could argue any similarity is that the likely source of income that we'll allege in this case and hope to prove is drug income. But otherwise, they're unrelated cases.

MR. SMITH: Lastly, Your Honor, I did have to communicate to Mr. Larson that unless he were to enter a plea of guilty here, I mean that the United States Government was considering some criminal actions against other members of his family. I told him that he should, in effect, block that out, though, because that shouldn't be his--

involved in his determination whether or not he pleads guilty in his own case. His case should be determined only on the factors involved in his own case.

And knowing all those things, though, Mr. Larson is it appropriate to say what cap the United States Government was talking? It's up to Your Honor. I'll tell ya if--so we--I mean, they were really asking--they were gonna want 16 years. And, of course, they were going to leave it

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to Your Honor. It would be six years to either be--

THE COURT: They were going to leave it to me?

MR. SMITH: Yes, Your Honor. Either concurrent or consecutive in that sense.

But their cap, which we would have had to agree to, would be a 16 year cap.

Also, there was talk about five years at a later time.

MR. VOSEPKA: Well, there had been talk of five years, Your Honor. That was if we could have a decision by last Friday. We got no decision, so it's back to six years, at the option of the Court, whether it would be concurrent or consecutive. So we aren't really talking 16 years. It could be just the ten years he's got now if the Court should conclude that I'm wrong in my judgment of Mr. Larson's culpability.

I might say that Mr. Smith has made a statement that we've indicated that if he didn't plead guilty, we were going to prosecute family members. That is not correct. We advised him out of a total sense of candor, that there were pending investigations against family members of his. But there is no agreement nor no suggestion of agreement that we would drop any investigation or drop any charges if charges were to

be brought against family

members as a result of his plea of guilty. We did advise him, however, that there were such possibilities.

THE COURT: Have you had a chance to talk? If our Probation Officer, Mr. Johnson were here.

Have you had a chance to talk to him?

MR. SMITH: No, Your Honor.

THE COURT: Is he around somewhere?

MR. VOSEPKA: Yes, he is, Your Honor. He's here in the courtroom this morning.

THE COURT: Oh, is he here?

MR. VOSEPKA: Hes.

THE COURT: Oh, are you available, Mr. Johnson?

MR. WILLIAM JOHNSON: Yes, Your Honor.

THE COURT: Would you visit with these people?

MR. WILLIAM JOHNSON: Relative to the

plea agreement, Your Honor?

THE COURT: Yes.

MR. JOHNSON: Certainly.

THE COURT: I'll be here.

MR. SMITH: That's fine, Your Honor.

THE COURT: I'm glad you came, Mr. Johnson. Glad You're here.

MR. SMITH: I take it if we're unable to resolve this, we're going to begin next week, Your Honor?

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THE COURT: Pardon?

MR. SMITH: We're going to begin next week if we're unable to--

THE COURT: Well, if you'll visit, won't you Mr. Smith?

MR. SMITH: Yes, I'll be glad to, Your Honor.

THE COURT: And Mr. Kelly will help along, I think, too. He wants to help, too.

Don't you, Jay?

MR. KELLY: Yes, Your Honor.

MR. VOSEPKA: Are we excused, then, Your Honor?

THE COURT: Yes.

MR. VOSEPKA: Thank you.

(The Court stood in recess at 9:32 a.m., reconvening at 10:48 a.m., at which time the hearing resumed as follows.)

MR. VOSEPKA: Good morning again, Your Honor.

THE COURT: Good morning.

MR. VOSEPKA: We're all back in Court, again, Mr. Larson, his counsel, Mr. Smith, and myself. Mr. Smith and I had a chance to consult with Mr. Johnson of the Probation Office to discuss various factors, including the likely, actual time a defendant would serve given various proposals. Mr. Smith, who's a very effective advocate,

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twisted my arm and got me to come back down to the figure that he mentioned earlier,

which was the low figure I talked about. But, nonetheless, it does not appear that we have arrived at any conclusion that would result in a plea. And so, I believe that we're going to have to impose on some of the Court's time starting next week.

MR. SMITH: Yes, Your Honor.

THE COURT: That's the situation, huh?

MR. SMITH: Apparent--yes, Your Honor.

THE COURT: Did you talk him down, did you?

MR. SMITH: I think it was almost he talked himself down to one--to five instead of six. I don't like to take credit for it, Your Honor.

MR. VOSEPKA: Well, I think Mr. Smith is more persuasive. What it amounts to is that at a five-year proposal, given if this Court chose to give Mr. Larson the maximum that the plea bargain would allow and do that consecutively, Mr. Larson, in effect, would serve eight more months actual time.

And I just can't realistically, on behalf of the government, come down any further than that and have a case that this much has gone into without some, some--at least a possibility of exposure beyond that. And, of course, we're not bargaining for a mandatory situation where the Court would be required to give that. Obviously, Mr. Smith would still be able to argue and perhaps convince you to

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So that's the situation.

MR. VOSEPKA: That's not quite correct, Your Honor. As far as income witnesses, the Jencks material I provided to the Court and to counsel provides all of the witnesses to income during the taxable years, and all the documents are provided in discovery if not covered by a witness other than a bank witness. What I thought Mr. Smith was referring to--and I think he's referring to--

is witnesses that would put Mr. Larson in drug dealing before, during and after the tax years. Those very few witnesses we are going to provide on Monday. I, frankly, don't want Mr. Larson to have the access to that information over the weekend. I have, however, in discovery summarized very thoroughly and pointedly what their testimony would be for Mr. Smith. The only thing he's lacking at this point is the identity of those witnesses.

THE COURT: Is there some concern about this defendant threatening witnesses?

MR. VOSEPKA: There is some concern on my part, yes, sir, Your Honor, based on some past information coming from witnesses.

In any event, I must say quite honestly to the Court that I believe--that was the last thing that was brought up to me by Mr. Smith after he had presented our final state of situation with Mr. Larson. And I believe Mr.

Smith was coming back with that to me merely to see if he could get the identity of those witnesses, with no hope whatsoever of there being any plea. I don't think Mr. Larson is inclined to plead in this case unless he faces no further exposure.

MR. SMITH: I think its regrettable about the threatening part, Your Honor. Mr. Larson has been out on bond for two years. And in four years, this investigation has been going on. So our position is as we stated, and we'd be ready to proceed to trial, Your Honor.

THE COURT: At the time of the conviction, was the new Bail Reform Act in effect?

MR. SMITH: Bond has been set, ah--

THE COURT: That isn't my question.

MR. SMITH: Ah, no.

THE COURT: At the time he was convicted-

MR. SMITH: No.

THE COURT: --was the new Bail Reform

Act in effect?

MR. SMITH: It was not, Your Honor.

THE COURT: I see. But now that the conviction has been affirmed, has there been some motion to vacate bail?

MR. SMITH: No, there has not, Your Honor.

MR. VOSEPKA: Your Honor, I do intend to file

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has the file?

MR. SMITH: That could be.

THE COURT: Jay, did you ask for it?

MR. KELLY: Yes, Your Honor.

THE COURT: Oh, is he working on that now?

MR. KELLY: Yes. I saw Mr. Anderson this morning and he said he'd probably be finished with it today.

THE COURT: Oh, that's why he has the file.

But I never did see the indictment before. Or if I did, I didn't read it.

Let's see, Count I is what?

MR. VOSEPKA: Tax evasion, Your Honor, under 7201 for the year 1978.

THE COURT: And what's the penalty for tax evasion?

MR. VOSEPKA: Five years and $10,000 fine.

In fact, Your Honor, to save the Court some time, the penalty on all five counts, including the 1001 counts, Counts IV and V, is five years and a $10,000 fine.

So the maximum available to the Court will be 25 years and $50,000 in fines. If there should be a conviction on all counts, of course.

THE COURT: You stole my stuff, is what you did.

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MR. VOSEPKA: I'm sorry, Your Honor, I

apologize.

THE COURT: And Count II is tax evasion?

MR. SMITH: Yes, Your Honor.

MR. VOSEPKA: Yes, sir. For the year - 1979.

THE COURT: Seventy?

MR. VOSEPKA: Nine.

THE COURT: Seventy-nine.

And that's five years plus--

MR. VOSEPKA: Ten thousand.

THE COURT: And Count III?

MR. VOSEPKA: For '80. And tax evasion again. And same penalty.

THE COURT: For '80?

MR. VOSEPKA: Yes, sir.

THE COURT: That's five years.

And then Count IV. That's the $10,000 plus?

MR. VOSEPKA: Yes. That's five years, again, and $10,000 fine under the statute as well.

THE COURT: Multiple purchase of bank

money orders, cashier's checks in one day which exceed $10,000? Presumably--did you draw this indictment?

MR. VOSEPKA: Yes, sir, I did.

THE COURT: Presumably, your theory is he intentionally made them less than ten? Several of them?

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MR. VOSEPKA: Yes, sir.

THE COURT: But accumulated, made more than ten?

MR. VOSEPKA: That's correct, Your Honor.

THE COURT: How much were they?

MR. VOSEPKA: The total I think is in that count. I think the first one would be 44,000, I believe. And the other one is about 53,000. Or I might have them reversed between Counts IV and V. The figures are in the counts, I believe, Your Honor.

THE COURT: Forty-four five. That's what it says. And that's five years?

MR. VOSEPKA: Yes, Sir.

THE COURT: And Count V. The same thing? That's a single day, too. That's November 30th. And the first one was September 17th?

MR. VOSEPKA: September 17th, yes.

THE COURT: Same year?

MR. VOSEPKA: Yes sir. 1982.

THE COURT: About two months later. And that was fifty-three hundred?

MR. VOSEPKA: 53,000, Your Honor.

THE COURT: Fifty-three thousand three hundred?

MR. VOSEPKA: Yes, sir.

THE COURT: And that's five years.

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How long would it take to try Counts IV and V?

MR. VOSEPKA: Not long, Your Honor. It would take--

THE COURT: A day?

MR. VOSEPKA: Probably.

THE COURT: Well, I'd have ten years there if here were convicted, wouldn't I?

MR. VOSEPKA: Yes, you certainly would, Your Honor.

THE COURT: I have a feeling if you two gentlemen were to try--is it a net worth theory?

MR. VOSEPKA: Yes, sir, it is.

THE COURT: I have a feeling you two gentlemen would be quite extensive about that.

MR. VOSEPKA: I would try to be as brief as possible. I don't know what the Court's view of my verbosity is, but I would do my best. it does appear that Mr. Smith is going to try to work with us to try to accomplish as many stipulations as possible.

THE COURT: But if we just tried IV and V, that would take a day, maybe?

MR. VOSEPKA: I'd say so, Your Honor.

THE COURT: How would that be? That would give him ten years. How would it be

if we segregated it? I don't see much sense in--

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MR. SMITH: Well, the point, though, is, Your Honor, the other three counts would be just out there. And if Mr. Larson were to have been found guilty by one jury, I would want the whole thing tried together. I wouldn't want to have two juries have to-- have to win before two juries in order to be found not guilty of this indictment.

THE COURT: Well, we could use the same jury. We could pick the same jury and try Counts IV and V, and then thank them very much, and then go ahead, if the need be, and try Counts I, II and III. It seems to me that all I need, in view of his ten years that he's already received from Judge Murphy, is another ten years.

MR. SMITH: I would hope so, Your Honor.

THE COURT: I mean, I could have another

25, but I don't s'pose I'd give him 25.

How does that sound to you?

MR. SMITH: Well, the point of--how does it sound, Your Honor? The point--if the Court and the government--

THE COURT: Won't you come over here?

MR. SMITH: I'm sorry. If the Court and the government--

THE COURT: We people sometimes have a littie trouble hearing.

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MR. SMITH: --were to say if he were found guilty, for instance, by a jury, of Counts IV and V, that there would be a dismissal of the other counts.

THE COURT: No, I don't say that. No, I don't say that. I just say we try them seriatim, and I might dismiss them on my own after we tried IV and V. I don't make any representation to you. I don't make any deal with you at all.

MR. SMITH: Yeah. Well, that's the thing, Your Honor.

THE COURT: That I might segregate them on my own, Counts IV and V.

Could you try that in a day?

MR. VOSEPKA: Yes, sir, I believe we could.

THE COURT: Could you try that in a day?

MR. SMITH: I would say probably a couple of days. It would be a short trial, Your Honor, yeah.

THE COURT: That's what we need here.

MR. SMITH: The seven hour rule?

THE COURT: Pardon?

MR. SMITH: It might be within the seven hour rule.

THE COURT: Well, how many hours was the last case? Was it seven?

THE CLERK: No, not quite.

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THE COURT: They spent a great deal of

time striking jurors and I think they spent more than thirty minutes striking jurors.

MR. SMITH: Your Honor, I would have to object to such a procedure, though; bifurcating the trial.

THE COURT: Oh.

MR. SMITH: There's one indictment here, and--

THE COURT: Well, if you'll file your briefs with me on Monday morning, say by 9:00 o'clock, as to the authority of the Court on its own, with the same jury, to segregate first and try the counts dealing with the $10,000 plus transactions and then on the income tax.

MR. VOSEPKA: Certainly, Your Honor.

THE COURT: So if you get to your briefs in on Monday morning.

MR. SMITH: I will, Your Honor.

MR. VOSEPKA: I would advise the Court, too, just so that the Court is aware of the posture of things as between what limited

possibility of plea bargain there was and what I feel there is none, I did advise Mr. Smith that for there to be any plea bargain of any kind on our part, we would have to know today, be advised today. If we come in with our briefs on Monday and come in for trial on Monday, we anticipate a trial, unless Mr. Larson by then had decided to plead straight out to the indictment.

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digging out documents, we should say nine or ten wtinesses, Your Honor.

THE COURL: Probably bank officers?

MR. VOSEPKA: Some of them--most of them would be very short. Even the key witnesses would be relatively short.

THE COURT: Yeah. It normally doesn't take long to try those.

MR. VOSEPKA: No, sir.

THE COURT: And they're quite clear cut.

MR. VOSEPKA: Yes, Your Honor, I believe

those two counts will be quite clear cut.

MR. SMITH: Is that Your Honor's thinking is as of this moment? That, first of all, we should file a brief in opposition to Your Honor bifurcating the IV and V?

THE COURT: To my authority to do so.

MR. SMITH: Right.

And then, assuming that Your Honor feels that we have not--or assuming that Mr. Vosepka has shown Your Honor that you do have such authority, that would be your intention; to proceed 2:00 o'clock on--

THE COURT: No, I don't make any representation like that or what my intention will be, no.

MR. SMITH: Oh. all right, Judge.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Criminal No. 3-85-43

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	MEMORANDUM ON
	)	SEVEREANCE
v.	)	OF COUNTS
	)	
DUANE WENDALL LARSON,	)	
	)	
Defendant.	)	

After counsel discussed the nature of the case at the pre-trial hearing on Friday, May 31, 1985, this Court decided that the interests of justice would best be served by a severance of Counts IV and V of the indictment in the above captioned case. Counsel for the defendant opposed such an action, but did not cite case authority to this Court which would preclude severance.

Counts I, II, and III of the indictment are tax evasion charges for the years 1978, 1979, and 1980. Counts IV and V are concealment of material fact charges for two incidents of conduct in 1982 designed to thwart the currency transaction reporting require-

ments placed on financial institutions. It is the government's position that the conduct related to the currency transaction (hereinafter (C.T.R.) violations and the tax evasion are so intertwined that joinder was proper under Rule 8, Federal Rules of Criminal Procedure.

However, there is no doubt that the degree of complexity involved in the trial of the tax charges will be vastly greater than that in a trial on the C.T.R. charges. The Court estimated one and one-half to two weeks of trial on the tax charges, although the government's estimate was two to three weeks. Trial of the C.T.R. counts, on the other hand, will take one to two days. It cannot be said that there is no possibility of confusion of issues or prejudice from a trial of both types of counts together.

While the government contends the possibility of prejudice or confusion of issues

is minimal, the law is clear that the Court, in its sound discretion, has the right and obligation to make the decision as to whether severance is appropriate. Pointer v. United States, 151 U.S. 396 (1894).

Rule 14, Federal Rules of Criminal Procedure, authorizes the trial court to grant relief from the joinder of offenses in an indictment "[i]f it appears that a defendant or the government is prejudiced by [the] joinder." United States v. King, 567 F. 2d 785, 787 (8th Cir. 1977). The Court is authorized to order "separate trials of counts, grant a severence of defendants or provide whatever relief justice requires." Rule 14, Federal Rules of Criminal Procedure. In determining whether to grant relief under Rule 14, a district court "has wide discretion and the court's ruling is rarely disturbed on review." United States v. King, supra, at 788.

Although judicial economy favors a joinder of all offenses against the accused, the district court "must balance the potential prejudice to the defendant against the public interest in joint trial." United States v. Berkowitz, 662 F. 2d 1127, 1132 (5th Cir. 1981). "Where there is a joinder of offenses, [i]nevitably, some prejudice results from having the jury aware of evidence of one crime while considering whether the defendant is guilty of another." United States v. Dennis, 625 F. 2d 802 (8th Cir. 1980).

The question is whether the potential prejudice justifies severing the counts of an indictment. Potential prejudice arises in a case involving complex and confusing issues, such as the instant case. See, United States v. Cavale, 688 F. 2d 1098, 1107 (7th Cir. 1982). Severance operates to assure that a defendant obtains a fair trial. United Stats v. Oxford, 735 F. 2d 276, 279 (7th Cir. 1984). As the Court stated in

Cavale, supra, at 1107:

> The question of whether a joint trial infringes upon the defendant's right to a fair trial depends on whether it is within the jury's capacity, given the complexity of the case, to follow the admonitory instructions and to keep separate, collate and aprise the evidence relevant only to each defendant.

Although Cavale involved serverance of defendants, the court's reasoning is applicable to the severance of offenses. The court has the discretion to sever the counts of an indictment where confusion over the issues would likely infringe

upon a defendant's right to a fair trial. Furthermore, where it appears that judicial administration of a trial would be enhanced by severance, then the court's balancing of potential prejudice against judicial economy clearly favors severance of the counts. See, United States v. Dennis, supra, at 801.

Not only is a district court authorized

to sever the counts of an indictment, "a trial court has a continuing duty to insure that prejudice does not occur, and if it does, to sever defendants or offenses." United States v. Petersen, 611 F. 2d 1313, 1331 (10th Cir. 1979), citing, Schaffer v. United States, 362 U.S. 511 (1960). Because a trial court is under a duty to monitor for prejudice as well as to efficiently administer its caseload, a court may, at its discretion, act sua sponte and order the severance of offenses for separate trial. See United States v. Petersen, supra, at 1331. One appellate court has stated that a district court has no duty to act sua sponte on severance issues. United States Melton, 689 F. 2d 679, 687 (7th Cir. 1982). A trial court's only duty is to rule on severance motions as presented. Id. The issue on appeal in Melton was whether the district court erred in failing to order severance sua sponte. In finding no duty

incumbent upon the district court, the appellate court simply affirms other decisions which hold that failure to act sua sponte is not prejudicial error. See, United States v. Murzyn, 631 F. 2d 525, 535 (7th Cir. 1980). Severance is within the

discretion of the trial court. Because a court's failure to act sua sponte does not constitute error, neither will its acting sua sponte constitute error. Moreover, since the court has the affirmative burden of assuring a fair trial, the lack of a motion by either party does not operate to proscribe the court's decision.

Because severance protects a defendant against prejudice, any severance order made sua sponte by the court favors a defendant, who usually has the heavy burden of showing prejudice sufficient to justify a motion for severance. See, United States v. Berkowitz,

supra, at 1132. A district court clearly has the authority to sever the counts in an indictment where it appears that a party is prejudiced by a joinder of offenses. Prejudice can arise, and, therefore, infringe upon the right to a fair trial, within the context of a complex and confusing case where a jury may find it difficult to separate the evidence as it relates to the separate offenses.

Judicial economy does not necessarily militate against severance. A district court has a continuing duty to insure that prejudice does not occur. For the foregoing reasons, the Court here has the authority to act sua sponte and order severance of the counts in the indictment.

Dated: June 3, 1985.

JAMES M. ROSENBAUM
United States Attorney

BY: RICHARD E. VOSEPKA
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Criminal No. 3-85-43

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	MEMORANDUM IN
	)	SUPPORT OF
v.	)	OBJECTIONS TO
	)	SEVER COUNTS
DUANE WENDALL LARSON,	)	IV AND V OF
	)	INDICTMENT
Defendant.	)	

Now comes Defendant Duane Wendall Larson by his attorney, Raymond J. Smith, and objects as follows to the Government's Motion for Severance of Count IV and Count V.

1. On May 31, 1985, the Government moved to sever and proceed to trial on Counts IV and V of the pending indictment (false statements in connection with a currency transaction in violation of 18 U.S.C. §1001); and to defer trial on Counts I, II and III (evasion of income tax in violation of 26 U.S.C. §7201).

2. There is no valid reason on the record that would support such a severance. Severance is contrary to the defendant's

interest in a prompt and speedy adjudication by a single jury of all the charges against him.

3. Granting a severance under these circumstances is contrary to Rule 14 of the Federal Rules of Criminal Procedure

and the cases construing those rules. See, e.g., United states v. Grullon, 482 F. Supp. 429 (E.D. Penn. 1979), United States v. Cappello, 209 F. Supp. 959 (E.D. N.Y. 1962); Garris v. United States, 418 F. 2d 467 (D.C. Cir. 1969).

WHEREFORE, we respectfully request the Court to deny the Government's Motion to Sever Counts IV and V of the Indictment.

Dated: June 3, 1985. Respectfully submitted,

Raymond J. Smith
Attorney for Defendant
Duane Wendall Larson

BY: Jay B. Kelly
2200 Washington Square
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION -
Criminal No. 3-85-43

UNITED STATES OF AMERICA,

Plaintiff, Cr. 3-85-43

v. ORDER

DUANE WENDALL LARSON,

Defendant.

James M. Rosenbaum, United States Attorney, by Richard E. Vosepka, Assistant United States Attorney, Minneapolis, Minnesota for plaintiff.

Raymond J. Smith and Jay B. Kelly, Minneapolis, Minnesota for defendant.

Based on the arguments of counsel, their legal memoranda, the fact that defendant is not prejudiced by severance of Counts IV and V, and the files, proceedings and records in this case,

IT IS ORDERED that Counts IV and V of the indictment are severed from Counts I, II and III for purposes of trial. Trial on

Counts IV and V shall commence on June 21, 1985 at 2:00 P.M.

Dated: June 4, 1985.

/s/
EDWARD J. DEVITT
United States District Judge

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which would relate to any witnesses on this case to the defense today. The Court will recall that there were a few witnesses that we held back on the Jencks until the day of trial. There was only one in the instance of this particular trial that we're going to have today. That was provided to the defense.

Mr. Smith has graciously agreed, after reviewing the matter with his client, to a significant number of testimonial stipulations which I think will save us a little time. And the government is prepared to proceed, and we're ready to start now, I guess, with opening statements, if it's the Court's pleasure.

Your Honor, the two counts we will be trying today, which, in the redrafted indictment that we've provided to the Court, are now listed as Counts I and II, of course, are Counts IV and V of the original indict-

ment. Those two counts charge two separate instances in 1982, when, it is alleged, Mr. Larson engaged in a series of cash transactions, the purpose of which was to deceive the banks so that they did not meet the currency-transaction requirements which are incumbent upon the banks and which, therefore, would prevent the department or agency, in this case the Department of the Treasury, from having information which, by law, they are entitled to and, in fact, is required of the banks.

What we're going to be showing you through

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testimony and exhibits, Your Honor, is, number one, those two days, the events of those two days, but we're going to be, also, showing that those two days were reflective of a course of conduct that started at least as early as January of

1979. We're going to be showing you that as early as January of 1979, Mr. Larson was advising friends in the handling of money, which was his and which had been loaned, as to how to conduct transactions, the purpose of which would be to get around the currency transaction requirements that are on the banks.

We will show you through the testimony of one witness a $20,000 situation where Mr. Larson loaned this individual money for a business undertaking which the individual later chose not to undertake, and we will show you the instructions that Mr. Larson gave this individual, whose name is Donald Leach, for the return of the money. I think you''ll find, in the instructions, he was given clear indication of the knowledge and intent of Mr. Larson at that early stage, a full three years before the two incidents which are charged.

We will also show you through a series

of exhibits, primarily bank money orders and cashier's checks transactions done by Mr. Larson himself, currency transactions, multiple acquisitions of bank money orders or cashier's checks in a single day during 1979 and later, which

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again show that he for a period of years engaged in this course of activity.

We're going to be offering for your consideration copies of Mr. Larson's tax returns for the years 1974 through 1982.

Now, we understand, of course, that this is not the tax portion of the trial. However, the relevance of those documents will be found in various items contained in the tax returns. First of all, you will be able to note the occupation which he claims during these various years. And that occupation, as listed in the tax returns, is going to be contradictory to claims he made to bank

officials on November 30th, when he is confronted with the nature of transactions he's engaged in.

The tax returns will also show you a home address, which is relevant to some documents that you will see later. They go to his knowledge and intent with regard to his income and his dealing with the IRS.

You're going to hear testimony, Your Honor, from Special Agent Perry Stow that he began a tax investigation of Mr. Larson in June of 1981 and notified Mr. Larson of this in August of 1981.

You will note a distinction between the type of filing, the claim of income, the amount of income and the contents of the returns that were filed after that time--

O. PERRY STOW DIRECT 12

BY MR. VOSEPKA:

Q. Would you state your name and occupation, please.

A. My first name is the initial O, Perry Stow, S-t-o-w. I'm a Special Agent with the Criminal Investigation Division of Internal Revenue Service.

Q. Now, Special Agent Stow, how long have you been employed as a Special Agent of the IRS?

A. About fourteen years.

Q. And where are you currently stationed?

A. Mankato, Minnesota.

Q. Now, how long have you been stationed there?

A. About 12 and a half years.

Q. During the time that you have been a Special Agent with the Criminal Investigation Division of the IRS in Mankato, have you had occassion to be involved in investigation, in your official duties, of anyone you see in the Courtroom today?

A. Yes.

Q. All right. I'm going to stand aside. And if you see the person in the Courtroom

today that you were investigating, would you point that person out and describe him?

(Defendant Larson stood up at this point.)

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A. Duane Wendall Larson. He just stood behind attorney Ray Smith.

Q. Now, when was it that you had occassion to begin an investigation of Mr. Larson?

A. During June 1981.

Q. And without going into detail, what was the general nature of the allegation that predicated your investigation?

A. The general allegation was that Mr. Larson may be invovled in narcotics trafficking and that he would not be reporting that income on his tax returns.

Q. All right. So would this have been a tax evastion type of investigation?

A. Yes, it was.

Q. In the course of that investigation, did you obtain documents and other evidence

that might relate to whether such allegations would be true or false?

A. Yes.

Q. All right. And did you at any point in time have reason to notify Mr. Larson of the fact that you were conducting a criminal investigation?

A. Yes, I did.

Q. When was that?

A. August 11, 1981.

Q. And how did you notify him?

A. Another agent, James Cashman, and myself went to Mr. Larson's home, knocked on the door. Duane Larson came to the door. We identified ourselves, showed our Special Agent badges and credentials. I notified Mr. Larson of his rights, his constitutional rights, and I told him he was under investigation.

Q. And did you explain the nature of the

investigation?

A. I explained the years under investigation were the years 1978, 1979 and 1980.

It wasn't a very long conversation. And I didn't get into much depth as to what I was doing.

Q. Did you advise him that it was a criminal investigation?

A. Yes, I did.

Q. Did you advise him, either in specific terms or in general terms, that it related to possible tax evastion.

Q. Yes, I did. The term I used was "income-tax violations."

Q. All right. And you say this was on August 11, 1981?

A. That's correct.

Q. Did you continue your investigation after that date?

A. Yes, I did.

Q. You've indicated that you obtained documents from various sources as a part of

this investigation.

Did you have occassion to obtain from the Internal Revenue Service past tax returns of Mr. Larson?

A. Yes, I did.

O. PERRY STOW DIRECT 15

A. I'm going to show you now what has previously been marked as Government's Exhibits 1-1 through 1-10. Or -9. 1-9. And I'm going to ask you if you can identify those nine documents.

A. Yes, I can.

Q. And how can you identify them?

A. These are what we call blue-ribbon copies of the original tax returns. They're photocopies of the original tax return, and the Chief of Criminal Investigations Division has signed that they are a true copy on the cover sheet.

Q. All right. And for what years do they relate?

A. Years 1974 through 1982.

MR. VOSEPKA: At this time, Your Honor, I would show Government Exhibits 1-1 through 1-9 to the defense for his examination and possible objection.

MR. SMITH: Excuse me. You're intending to offer them at this time?

MR. VOSEPKA: Yes.

MR. SMITH: All right. I do have an objection, Your Honor, to any of the returns prior to 1982. The counts charged in this indictment is 1982. Mr. Vosepka, in his opening statement, made references to two purposes--or basically three purposes that he wanted to introduce the prior returns for.

the indictment, a bank official at National City Bank confronted Mr. Larson about the nature of his cash transactions that day. They had a discussion, in which she questioned Mr. Larson as to why the remitter

name that he was getting these checks in were other than his own. And, as you'll see from later evidence, there were--by 1982, he was not using his own name as remitter on these checks. His explanation was that he was a stock broker and these were client transactions.

So, number one: These tax returns over an eight-year period preceeding and up to and through 1982 establish conclusively that he never at anytime clained to be a stock broker or financial adviser.

Number two: Again, we have to prove that he had criminal knowledge--a criminal intent, I should say, and that his actions are knowingly and wilfully done.

I think, as the Court looks at the returns, the Court will see that up through the 1980 return, Mr. Larson reported very nominal income, or even a loss. When he becomes aware of Special Agent Stow's investigation, the following year he declares

something like a hundred fifty thousand dollars of income, in marked contrast to any of the returns that preceded it, and the source of that income is not disclosed on the return.

Likewise, in 1982, he reports about a hundred twenty-four thousand, or something like that, in income,

O. PERRY STOW DIRECT 18

again in marked contrast to any of the years, other than the 1981 return, that had preceded. Again, he does not identify the source of this income, however.

Your Honor, it clearly goes to show that he had a state of mind of wanting to conceal from the IRS his assets. He was getting income from whatever source, whether legal or illegal, that he did not want to disclose. And those returns show that conclusively. And that gives the motive, although I understand we don't have to prove motive. Proof

of motive by the government to show the jury the intent that is necessary. These returns show what his motivation was for engaging in the course of action he did for three years, including the two instances of 1982.

On that basis, we offer the exhibits.

THE COURT: The exhibits may be received.

(Government Exhibits 1-1 through 1-9, inclusive, received in evidence.)

BY MR. VOSEPKA:

Q. Now, I'm going to place Government's Exhibits 1-1 through 1-9, which are now in evidence, in front of you, Special Agent Stow. I'm going to ask you if you have examined those, prior to coming to Court today, carefully.

A. Yes, I have.

Q. All right. And you have examined the Occupation line

Exhibits 3-1 through 3-8, and ask you if you

can identify them.

A. Yes, I can.

Q. And how are you able to identify them?

A. These are bank money orders, cashier's checks--and cashier's checks that I obtained during the investigation.

Q. All right. And did you obtain them from the financial institutions that were responsible for issuing them?

A. Yes, I did.

MR. VOSEPKA: At this time, Your Honor, I show Government's Exhibits 3-1 through 3-8 to Mr. Smith for his examination.

MR. SMITH: Thank you.

Judge, the only objection to the three series is the fact that they relate to the year 1979, and, therefore, three years prior to the counts in this indictment.

MR. VOSEPKA: Your Honor, we offer them under Rule 404(b) as examples of circumstances which show the intent, the motive of the defendant in this case. And, therefore, while

they are, perhaps, examples of other crimes, they do relate directly to a similar course of conduct.

THE COURT: They may be received.

(Government Exhibits 3-1 through 3-8, inclusive, received in evidence.)

O. PERRY STOW DIRECT 26

BY MR. VOSEPKA:

A. Now, Special Agent Stow, I'm going to show you again 3-1 through 3-8, which has now been received in evidence, and ask you to look at the dates on those documents and indicate to His Honor what the dates are.

A. Each of these documents was purchased on February 12, 1979 at Mankato banks.

Q. And is there a payee listed on those eight documents?

A. Yes, there is.

Q. And who is that payee.

A. All but one says Duane Larson. The other one says Duane Olson, O-l-s-o-n.

Q. All right. And who endorsed each of those?

A. Duane Larson.

Q. Including the one that was made out to Duane Olson?

A. Yes.

Q. Now, would you go through them and identify the different banks for the Court that are involved in those eight documents?

A. Northwestern Bank Mankato. Their name is now Norwest Bank. American State Bank, Mankato. Their name is now American Bank of Mankato.

Q. Before you go any further, how many checks were there from Northwestern Bank of Mankato?

A. Three. They're cashier's checks.

O. PERRY STOW DIRECT 27

Q. All right. Go ahead.

A. The item from American State Bank is a bank money order.

Then there's a bank money order from First National Bank Mankato, which is now First Bank Mankato.

There's a bank money order from National Bank of Commerce Mankato.

There's a cashier's check from Security State Bank Mankato and a bank money order from Valley National Bank North Mankato.

Q. And you've indicated that all of those were purchased on February 12, 1979. Is that correct?

A. That's correct.

Q. What is the total of those eight money orders or cashier's checks?

A. $33,800.

Q. All right. And were they endorsed over to some business or person that you can identify from the endorsement?

A. Yes. They're endorsed to Mike Follette Coin Company.

Q. All eight of them?

A. Yes.

Q. And do you know what this Mr. Follette is in?

A. Yes.

Q. What is his business?

A. It's a coin dealer from Dallas, Texas that sells and

buys rare coins and bullion and precious metals. That type of thing.

Q. And again, all eight of those were made out to him?

A. They're endorsed to him.

Q. I'm sorry. Endorsed to him?

A. That's correct.

Q. One further question on these before we leave them. The amounts of these individual checks or money orders. What is the highest amount of any one of those.

Q. $4,600.

Q. What's the general range of those checks?

A. With the exception of one for $2,300,

they range from 4400 to $4,600.

Q. Thank you.

Now, I'm going to turn to Government's Exhibits 4-1 through 4-3 for identification, and ask you if you can identify those items.

A. Yes, I can.

Q. And how can you identify them?

A. They are additional bank money orders and cashier's checks that I obtained during the investigation.

Q. And did you obtain them from the financial institutions which issued them?

A. Yes, I did.

MR. VOSEPKA: Your Honor, at this time I'm going

to show Government's Exhibits 4-1 through 4-3 to Mr. Smith for his examination.

MR. SMITH: Judge, the same objection. 1979 checks do not establish a prior criminal act.

MR. VOSEPKA: Our position would be the same on behalf of the government, Your Honor.

THE COURT: They may be received.

(Government Exhibits 4-1, 4-2 and 4-3 received in evidence.)

BY MR. VOSEPKA:

Q. Placing before you Government's Exhibits 4-1 and 4-3, which have been received, I'd ask you to tell the Court what date those relate to.

A. August 10, 1979.

Q. Are they all dated with that date?

A. That's--yes, they are.

Q. What are the financial institutions involved?

A. First National Bank Mankato, National Bank of Commerce North Mankato, Security State Bank Mankato.

Q. What's the total of the three checks?

A. $14,300.

Q. And individually, what are their amounts, going first from 4-1 and then to 4-3 resepctively?

A. $4,800, $4,800, $4,700.

Q. Are they endorsed to any particular individual or

business?

A. Each of them is endorsed to Michael Follette Coin Company.

Q. Would you spell that for the Court Reporter, please?

A. It's Follette with two ls and two ts. F-o-l-l-e-t-t-e.

THE REPORTER: Thank you.

BY MR. VOSEPKA:

Q. All right. And who is the remitter on each of those checks?

A. The remitter on two of the three is typed as "Duane Larson". The third is listed as "Self."

Q. With regard to that one that is "Self," is that 4-2-

A. Yes, it is.

Q. And is there a signature endorsing it over to Mr. Follette on the back side?

A. Yes, there is.

Q. And whose signature is it.

A. Duane Larson.

Q. And who did it indicate that the check should be paid to the order of?

A. Each of these is payable to Duane Larson.

Q. I'm going to go on to Goverhment's Exhibits 5-1 through 5-4 and ask you if you can recognize those exhibits?

A. Yes, I can.

O. PERRY STOW DIRECT 31

Q. And how can you recognize them?

A. These are additional money orders and cashier's checks that I found during the investigation.

Q. All right. And did you get them from the financial institutions which issued them?

A. Yes, I did.

MR. VOSEPKA: Your Honor, we would now

show Government's Exhibits 5-1 through 5-4 to Mr. Smith for his examination.

MR. SMITH: The same objection, Your Honor. Not prior acts of misconduct and relating to 1979.

MR. VOSEPKA: Same offer under 404(b), Your Honor.

THE COURT: They may be received.

(Government Exhibits 5-1 through 5-4, inclusive, received in evidence.)

BY MR. VOSEPKA:

Q. Showing you, now, Government's Exhibits 5-1 through 5-4, which are admitted in evidence. Would you identify the date or dates of those checks for the Court?

A. September 20, 1979.

Q. And what are the financial institutions involved?

A. American State Bank Mankato, National Bank of Commerce Mankato, Northwestern Bank Mankato, Valley National Bank North Mankato.

Q. What is the total of those four checks?

A. $18,550.

Q. And what are the amounts of those checks, going from 5-1, respectively, through 5-4?

A. $4600, $4600, $4650, $4700.

Q. Now, can you tell from the checks what was done with these checks?

A. Yes.

Q. What was done with those particular four checks that are in the Five Series?

A. Each of the checks was endorsed on the back by Duane Larson and deposited to First National Bank of Montgomery, Montgomery, Minnesota.

Q. Did Mr. Larson have an account or accounts at that bank?

A. Yes, he did.

Q. Do you know where Mr. Larson lived in 1979?

A. Yes, I do.

Q. Where was that?

A. Rural Route 1, Box 7, Good Thunder, Minnesota.

Q. Is that the same location you went to when you interviewed him in 1981?

A. No.

Q. Where was the location when you interviewed him in 1981?

A. It's a rural subdivision called Thunderbird Hills. That's Route 1, Kasota, Minnesota. That's K-a-s-o-t-a, Minnesota.

Q. Is that anywhere near Mankato?

A. Yes. It's about three miles from Mankato.

Q. Going to his residence in Good Thunder in 1979. Is that near Mankato?

A. It's about 15 miles from Mankato, yes.

Q. How far was that residence he was at in 1979 from Montgomery, Minnesota.

A. It's between 30 and 50 miles.

Q. And he had bank accounts at that Mont-

gomery bank during that time?

A. Yes.

Q. These four checks all went to that bank. Is that correct?

A. Yes.

Q. And he endorsed them?

A. Yes, he did.

Q. Who was the remitter on each of those checks?

A. Two of them show Duane Larson as remitter. Two of them show "Self", s-e-l-f, as remitter.

Q. Who were the checks made out to? PAY TO THE ORDER OF.

A. All were payable to Duane Larson.

Q. Going to the Six series of exhibits; Goverment's

Exhibits 6-1 through 6-4 for identification.

I show them to you, and ask if you can identify them?

A. Yes, I can.

Q. And how are you able to identify them?

A. These are cashier's checks and bank money order that I obtained during the investigation.

Q. And who did you obtain them from?

A. The financial institutions.

Q. That issued them?

A. Yes.

MR. VOSEPKA: At this time, I show Government's Exhibits 6-1 through 6-4 to the defense for their examination and possible objection.

MR. SMITH. Same objection, Your Honor. 1979 and not evidence of prior acts of misconduct.

MR. VOSEPKA: Same offer, Your Honor.

THE COURT: They may be received.

(Government Exhibits 6-1 through 6-4, inclusive, received in evidence.)

BY MR. VOSEPKA:

Q. Showing you, now, what has been admitted

in evidence as 6-1 through 6-4. I ask you to look through them and indicate the financial institutions involved.

A. National Bank of Commerce Mankato, Northewestern Bank

Mankato, Security State Bank Mankato, Valley National Bank North Mankato.

Q. What is the date or dates of those checks?

A. It's a single date. September 26, 1979 on each of the four documents.

Q. Who is the remitter on each of those checks?

A. Duane Larson on three of them. Duane W. Larson on the fourth.

Q. The fourth would be 6-4?

A. Yes.

Q. And who was the "PAY TO THE ORDER OF" provided on those checks?

A. Duane Larson on three of them and Duane

W. Larson on 6-4.

Q. Who endorsed the checks.

A. Duane Larson.

Q. Were they made payable to anyone?

A. Yes.

Q. By the endorsement?

A. Yes.

Q. Who?

A. Mike Follette Rare Coins.

Q. What were the amounts of each of them, going from 6-1 to 6-4, respectively?

A. $4600, $4600, $4,615 and $4600.

O. PERRY STOW DIRECT 36

Q. Turning, now, to Government's Exhibits 7-1 through 7-3. I place them in front of you for your identification, and ask you if you can identify those items.

A. Yes, I can.

Q. How are you able to identify them?

A. I obtained each of these from the financial institutions that issued them during

my investigation.

MR. VOSEPKA: At this time, Your Honor, I show Government's Exhibits 7-1 through 7-3 to Mr. Smith for his examination.

MR. SMITH: 7-1 through 7-3, Your Honor, same objection. 1979. Not prior acts of misconduct.

MR. VOSEPKA: Same offer, Your Honor.

THE COURT: They may be received.

(Government Exhibits 7-1 through 7-3, received in evidence.)

BY MR. VOSEPKA:

Q. I'm going to place Government's Exhibits 7-1 through 7-3, now admitted in evidence, in front of you, and ask you to identify the financial institutions involvee.

A. American State Bank Mankato, First National Bank Mankato, Valley National Bank North Mankato.

Q. And what is the date of these checks?

A. October 11, 1979.

Q. Who is the remitter on these checks?

A. Duane Larson on two of them and "Self" on the third.

Q. "Third" being 7-1?

A. Yes.

Q. Who were the checks made payable to?

A. Duane Larson.

Q. What were the amounts of the checks, going from 7-1 through 7-3, respectively?

A. $4,650, $4800, $4700.

Q. Is there an endorsement on the back of the checks?

A. Yes.

Q. Who endorsed them?

A. Duane Larson.

Q. And was it endorsed over to any person or business?

A. Yes. Mike Follette Coin Company.

Q. MR. VOSEPKA: At this time, Your Honor, I would propose that several of the testimonial stipulations which Mr. Smith and I have agreed to be read into the record by

Special Agent Stow, with the Court's permission.

MR. SMITH: In relation to Exhibit 8?

MR. VOSEPKA: Pardon?

(MR. Vosepka and Mr. Smith are privately conferring at this point.)

MR. VOSEPKA: Your Honor, there are more testimonial stipulations, but the six that I have placed in front of Special Agent Stow are six that relate to

testimony from the banks that he has been describiing in the Mankato area and relates specifically to these checks or bank money orders--cashier's checks or bank money orders. They are stipulations that have been agreed to by the government and the defense. After he reads these six stipulations, with the permission of the Court, I would offer them to your Clerk to be marked as Court exhibits.

THE COURT: Do they need to be read?

MR. VOSEPKA: No, Your Honor, if the Court would prefer--

THE COURT: They may be received.

MR. VOSEPKA: Then I would give these six stipulations to the Clerk for her marking as Court Exhibits.

MR. SMITH: No objections, Your Honor.

(The six not-individually-described stipulations were received by the Court as nonenumerated Court exhibits.)

BY MR. VOSEPKA:

Q. Just to go through with the flow of what those testimonial stipulations relate to, Special Agent Stow. You've read those testimonial stipulations, have you not?

A. Yes, I have.

Q. And generally relating to them, what is the information contained in all six of those from the respective banks.

A. Each of the bank's official would state that each of the cashier's checks or bank money orders just introduced as

given him a copy of the letter I'm about to hand the Court. I'm going to hand to your Clerk my original copy and a copy for the Court's file of a letter from a deputy attorney general authorizing a grant-of-immunity request by the government, and, based on that authorization, we would move the Court to compel, order the witness to give testimony by virtue of the fact that we have been authorized to immunize Mr. Leach from the use of that testimony against him.

MR. WERNICK: No objection.

THE COURT: Fine

MR. VOSEPKA: Then as I say, we move the Court for such an order, and ask that the Court order that the use of such testimony as Mr. Leach gives today not be susceptible to being used against him and that he, therefore, be ordered to testify.

THE COURT: I'll sign an order. He told you about it before?

MR. WERNICK: Pardon me?

THE COURT: You knew about this before?

MR. WERNICK: Yes.

THE COURT: Fine.

Would you say his name again?

THE CLERK: Donald Leach. L-e-a-c-h.

DONALD LEACH DIRECT 72

BY MR. VOSEPKA:

Q. Mr. Leach, would you state your name again for the Court.

A. Donald Leach.

Q. And, Mr. Leach, I'm going to ask you to speak up as much as possible because of the size of this room. It's sometimes hard to hear a witness.

Mr. Leach, in what community do you reside?

A. Armstrong, Iowa.

Q. And how long have you lived there, sir?

A. All my life.

Q. All right. In growing up, did you grow

up and know a person named Don--Duane Wendall Larson?

(Defendant Larson is now standing.)

A. Yes.

Q. For how long have you known Mr. Larson?

A. All my life.

Q. All right. Did he grow up in your area?

A. Yes.

Q. All right. And did you become friends socially over the years that you grew up together?

A. Yes.

Q. All right. And did you have contact with each other

nonexistant person on the back of the check?

I suggest it is not. These are overt actions taken by the defendant.

We haven't talked about those endorsements on the back, but the Court, as it reviews the evidence, can see and perhaps

already has seen, that the back of these checks have signatures which , I think the Court will conclude for itself, are very, very close in appearance to the signautres of Duane Larson, for the most part, although there are some where it appears he may have tried to conceal it by a change of inks or a change of type of signature. But for the most part, it appears to be the same handwriting that writes a name such as "Jim Adams" on the check.

Is that passive activity?

That's overt dishonesty, Your Honor. And we think that that's the kind of thing that helps this Court see what the intent and knowledge of this defendant is.

We see that when Mr. Larson was dealing with his friend as early as January and February of 1979, he already knew what the currency transaction reporting requirements were, a full three years before the two counts under indictment. We see at that

time that he himself is engaging in the same type of transactions that he had Mr. Leach engaged in.

You'll recall Mr. Leach's transactions are found in the Two series.

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Mr. Larson's 1979 transactions, at least those which we can identify, are in the series from Three through Seven.

We see from his tax returns that he reports virtually no income, including the year 1979, a year in which you have many checks before you in the Three through Seven series, which show substantial amounts of money in his hand which are not accounted for on his tax returns. This shows that as early as '79, he is trying to conceal information and assets from the Department of Treasury.

Wee see that in 1981, he continues this pattern. And the checks in 1981, which are

in the Twelve Series. 12-1 through 12-8, I think are quite instructive for the Court because, you will recall, Special Agent Stow notified Mr. Larson in person of the tax investigation of August 11th of '81. Well, we got those Western State Bank checks that Cheryl Grimes had gone back through her files and gotten. And prior to August 11th of '81, Mr. Larson is still conducting these transactions, as he did in 1979, using himself as the remitter and himself as the payee. That's on July 2nd, in 12-1 and 12-2.

On August 26th, shortly after he had been notified of the investigation, he's still using himself as the remitter and himself as the payee, in 12-3 through 12-4.

But now by October 27th of that year, we see 12-5

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Criminal No. 3-85-43

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
DUANE WENDALL LARSON,	)	
	)	
Defendant.	)	

On June 24, 1985, the government called Donald R. Leach as a witness in the bench trial of Counts IV and V of the above captioned case. Mr. Leach asserted that his testimony might incriminate him and, therefore, claimed his right to refuse to testify pursuant to the Fifth Amendment to the United States Constitution. The government sought an order compelling testimony based on an authorization received from the Assistant Attorney General, Tax Division, to apply for a grant of immunity from the use of such testimony against Mr. Leach pursuant to Title 18 United States Code, Section 6003.

Based on the foregoing and for good cause shown,

IT IS ORDERED that Donald R. Leach be compelled to testify concerning relevant facts in the above-captioned case, and that such testimony and all information derived therefrom shall not be used in any criminal proceeding against Donald R. Leach.

Dated: July 10, 1985.

/s/
EDWARD J. DEVITT, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Criminal No. 3-85-43

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	MOTION TO BAR
	)	PROSECUTION'S
v.	)	COUNTS I
	)	THROUGH III
DUANE WENDALL LARSON,	)	
	)	
Defendant.	)	

NOW COMES Defendant DUANE WENDALL LARSON, by and through his attorney, RAYMOND J. SMITH, and moves to bar Counts I through III (Income Tax Evasion 26 U.S.C. §7201), on the ground that under the facts and circumstances of this case the granting of a severance of Counts IV and V violated Rule 14 of the Federal Rules of Criminal Procedure, and that the government should not be allowed to proceed on the remaining counts before a new trier of fact and in furtherance of said motion states as follows:

1. On May 31, 1985, the government moved to sever and to proceed to trial on

Counts IV and V (currency transactions in violation of 17 U.S.C. [sic] §1001), and defer trial on Counts I, II and III without giving any reason in the record why such a severance should be granted.

2. There is no valid reason on this record that will support the severance that the court gave, and the severance is

contrary to the defendant's interests in a prompt and speedy adjudication by a single jury of all the charges against him. Granting such a severance under these circumstances is contrary to Rule 14 of the Federal Rules of Criminal Procedure and the cases construing those rules. See e.g., United States v. Grullon, 482 F. Supp. 429 (E.D. Penn. 1979), United States v. Cappello, 209 959 (E.D. N.Y. 1962); Garris v. United States, 418 F. 2d 467 (D.C. Cir. 1969).

3. The very purpose of Rule 14 is seen with the government's action in this

case. The government is "holding and hitting" using both the sentence of the currency transaction case and the trial and potential sentencing in the income tax case to force the defendant into an unwanted and inappropriate plea of guilty.

WHEREFORE, the defendant prays that this Court bar Counts I through III.

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Defendant Duane Wendall Larson

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Criminal No. 3-85-43

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	RESPONSE TO
	)	MOTION TO BAR
v.	)	PROSECUTION
	)	
DUANE WENDALL LARSON,	)	
	)	
Defendant.	)	

In its Motion to Bar Prosecution's Count I through III, counsel for the above captioned Defendant continues to incorrectly state that the government moved to sever the counts of the instant indictment to "hold and hit" the Defendant. To the contrary, the severance was undertaken sua sponte by the Court in the interest of justice. As requested by the Court, the government and defense did brief the issue of the authority to grant severance.

However, the government never sought severance orally or in brief. Likewise, the government never recommended or requested in any direct of indirect way that one set of

severed counts be tried before the other set of counts. Thus, the inaccuracy of the defense premise on all points causes the Defendant's Motion to topple of its own weight.

As noted previously, it was entirely within the Court's discretion to order severance and, under the facts of this

case, such discretion was exercised reasonably. E.g., Pointer v. United States, 151 U.S. 396 (1984); United States v. King, 567 F. 2d 785, 787 (8th Cir. 1977); United States v. Cavale, 688 F. 2d 1098, 1107 (7th Cir. 1982); and Rule 14, Federal Rules of Criminal Procedure.

The defense, not the government, sought acceleration of sentencing on the currency offenses, which might result in the pressure to plead guilty on the tax evasion charges which the defense speciously accuses the government of trying to accomplish. This defense strategy has included the assertion during

sentence allocution that the government intentionally delayed prosecution on the current indictment until after completion of the drug conviction in Criminal No. 4-83-84. This argument is also groundless since the investigation continued well after the indictment, conviction and sentencing in 4-83-84. Indeed, the government was not authorized by the Department of Justice to seek prosecution of the tax evasion charges until early 1985.

If the government were really trying to string out the charges against this Defendant, the currency transaction charges might have been charged after the drug case and before the tax case. The fact that these charges were indicted jointly, pursuant to Rule 8, Federal Rules of Criminal Procedure, belies the defense contention.

The reason for the many charges is simple and has nothing to do with prosecution strategy. Duane Larson is truly a major,

long time illegal drug dealer who has made vast profits from his dishonesty, and, more to the point, has violated many federal laws in the process. The government cannot be held responsible for the Defendant's conduct. Indeed, the government has made a very attractive plea offer on the tax evasion charges even though the Defendant deserves more punishment than he has presently received. It it had been accepted, government personnel could have moved on to other cases worth pursuing for the society. To be sure, Defendant's refusal to engage in serious plea negotiations is totally within his rights. But again, it is not the government's fault that this refusal results in a proliferation of trials.

It is interesting that in all the various proceedings involving this Defendant and in all the ingenious pleadings filed on his behalf to date, there never once has been an affirmative claim by the defense that the

Defendant did not do the acts alleged by the government to have been done by him. His not guilty pleas have been in all cases supported by "technical" defenses such as improper search, improper charges or the like. If the government can be termed to be "holding and hitting" for continuing to proceed on the truths of this Defendant's protracted and varied criminal activities, then it is a term to be used in a context of praise rather than criticism.

Dated: August 14, 1985.

FRANCIS X. HERMAN
United States Attorney

/s/
BY: RICHARD E. VOSEPKA
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

United States of America,

Plaintiff,

vs. Cr. 3-85-43
ORDER

Duane Wendall Larson,

Defendant.

Richard E. Vosepka, Assistant United States Attorney, for plaintiff.

Raymond J. Smith, of Burke and Smith Chartered, for defendant.

Defendant moves to bar prosecution's counts I through III. He contends that the counts against him were improperly severed. Rule 14 empowers the Court to order separate trials of counts if it appears that defendant or the government is prejudiced by joinder. The Court is satisfied that separate trials reduce the potential prejudice to defendant and promote the interests of justice. Accordingly, based on the parties' memoranda,

counsels' oral arguments, and the files, record, and proceedings,

IT IS ORDERED that defendant's motion to bar prosecution's counts I through III is denied.

Dated: August 16, 1985.

/s/
EDWARD J. DEVITT
United States District Judge

THE COURT: One day.

I visualize that a tax-fraud case could take a week or more.

MR. VOSEPKA: At least a week, Your Honor.

MR. SMITH: I would say about three weeks, Your Honor.

THE COURT: Three weeks?

MR. SMITH: Yes.

THE COURT: Then we save three weeks of time.

I assume prudence would dictate there'd be other dispostion. But if you haven't disposed of it, we'd just try it.

How long is it going to take, now?

MR. VOSEPKA: Well, Your Honor, at the time of the severance--prior to that time and even after that time, Mr. Smith has indicated --in fact, at the time of severance he indicated that we could try the tax case

in two or three days, which I don't agree with even with stipulations. I felt it would take about a week. Mr. Smith has indicated that foundation, authentication stipulations would be no problem, and probably none of the testimonial stipulations that related to items of income.

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AN INTERNAL REVENUE SERVICE SPECIAL AGENT: Two

MR. VOSEPKA: --or possibly two Jencks Act statements, they'll be provided Monday morning at the start of trial or before the start of trial. All the other Jencks material has been provided.

THE COURT: We're going to have a rather uneven session of Court this week and maybe next week, too, and the Clerk will tell you about that.

MR. SMITH: Thanks very much, Your Honor.

THE COURT: And when we pick the jury, we'll have to tell them that, too. Some afternoons we work, some mornings, and so forth.

But your best estimate of time now is how many days? How many full days would you estimate?

MR. VOSEPKA: Well, Your Honor, I would say under two weeks.

The Court has now received the government's exhibits.

Insofar as the Court has accepted the government's respresentations of authentication, that saves a great many witnesses who would serve no other purpose than to say that these are records from our business or our bank.

And without having had the chance to sit down

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tha: Before, during and after the period

of the three charges, which are for 1978, '79 and '80, Mr. Larson was a drug dealer and that was his occupation.

We will show through the tax returns that he at no time claimed that to be an occupation or at no time acknowledged income from that occupation.

We will show that during the years 1978, 1979 and 1980, his net worth increased very dramatically.

We will also show cash expenditures of various types during that time to buttress not only his increase in net worth, but to show generally his--the available income which he had. His net worth increased during each of the years that are charged. There were significant and substantial cash expenditures of various types during the years charged. And we will show through the documents and through testimony those facts.

We will also show through the docu-

ments and the testimony a pattern of concealment of income, and of net worth and assets, which we will urge was designed to hide from the IRS, among others, not only his source of income, but the amount and value of his worth. In that regard, we will be showing you information somewhat similar to what the Court saw in the Court trial on the currency transactions. Although, this evidence will relate to other transactions that that which the Court